Supreme Court, U.S.
FILED
APR 10 2000
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(2)

No. 99-1502

In The

Supreme Court of the United States

AMOCO PRODUCTION COMPANY,

Petitioner,

v.

LOBO EXPLORATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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April 10, 2000

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32 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause are violated when a court enters an interlocutory order certifying a nationwide class and finds that, while Oklahoma has a significant contact or aggregation of contacts with the class members and the claims asserted by the class such that application of Oklahoma law would not be arbitrary or unfair, it will reserve the final choice of law determination upon reaching the merits?

PARTIES TO THE PROCEEDING

Petitioner is Amoco Production Company. Respondent is Lobo Exploration Co., individually and as the representative of the plaintiff class set forth below:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.
>
> Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the force pooled working interest owner entered into a joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc., and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

Lobo Exploration Co. v. Amoco Production Co., 991 P.2d 1048, 1049-1050 (Okla. Ct. App. 1999), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Lobo Exploration Company declares that it has no parent or subsidiary companies or affiliates.

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RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent, Lobo Exploration Company ("Lobo"), respectfully submits its response and objection to Amoco Production Company's ("Amoco") petition for writ of *certiorari*.

JURISDICTION

This Court does not have jurisdiction. Amoco seeks *certiorari* review of a decision of the Oklahoma Court of Civil Appeals in *Lobo Exploration Company v. Amoco Production Company* affirming the interlocutory decision of the District Court of Beaver County, State of Oklahoma ("the trial court") granting class certification.[1] Pursuant to 28 U.S.C. §1257(a) this Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." It is apparent from the Oklahoma Court of Civil Appeal's decision and the trial court's order that there has not been a final judgment or decree.[2]

There can be no dispute about the interlocutory nature of the decision sought to be reviewed. Indeed, the case only reached the Oklahoma Supreme Court, wherein *certiorari* was denied, because Oklahoma law authorizes

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[1] *Lobo Exploration Company v. Amoco Production Company*, is reported at 991 P.2d 1048 (Okla. Ct. App. 1999) (Pet. App. 1a-15a), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999) (Pet. App. 57a).

[2] Pet. App. 7a, 17a.

limited review of certain interlocutory orders.[3] The fact that Oklahoma law provides for an interlocutory appeal and that a decision was had by the Oklahoma Court of Appeals has no effect on whether its ruling is final for purposes of 28 U.S.C. §1257(a).[4]

In *Gillette Co. v. Miner*, 459 U.S. 86 (1982) the Court addressed the issue of *certiorari* review of an interlocutory order, like the one in this case, which allowed a case to proceed forward as a class action. In *Miner* the Supreme Court of Illinois ruled that an Illinois state court could maintain an action on behalf of a nationwide plaintiff class of consumers. The defendant petitioned the United States Supreme Court for *certiorari*. The Court initially granted *certiorari*, but then dismissed the writ, succinctly stating, "There being no final judgment, the writ of *certiorari* is dismissed for want of jurisdiction."[5]

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."[6] Before a state court decision can be final and reviewable it "must

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[3] 12 Okla. Stat. §993A.6; Pet. App. 58a.

[4] *Dept. of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Bd. Of Equalization*, 329 U.S. 69, 72 (1946).

[5] *Gillette v. Miner*, 459 U.S. at 87. See also, *Flynt v. Ohio*, 451 U.S. 619 (1981) (dismissing writ of *certiorari* for want of jurisdiction due to lack of finality despite decision of state supreme court to review intermediate court decision remanding case for trial); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997) (dismissing writ of *certiorari* because the Alabama Supreme Court had not yet rendered a final judgment).

[6] *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

. . . be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein."[7] The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."[8] The decision of the Oklahoma Court of Appeals plainly does not meet this standard.

In support of its claim that this Court has jurisdiction, Amoco has cited *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975). In *Cox* the Court set forth four categories of cases in which the Court treated state-court judgments as final even though further proceedings were to take place in the state court.[9] In each category in *Cox* the

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[7] *Market St. Ry. Co. v. Railroad Comm'n.*, 324 U.S. 548, 551 (1945).

[8] *Collins v. Miller*, 252 U.S. 364, 370 (1920).

[9] *Cox Broadcasting Corp. v. Cohen*, holds that the finality requirement may be satisfied despite the pendency of further proceedings when: (1) "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . . " 420 U.S. at 479-483.

highest state court had finally decided the federal question and in at least most of the categories there was no risk that other federal questions would require a second review.[10] In the present case, the Oklahoma courts recognized the interlocutory, non-final nature of the class certification order in holding that the court had the authority to modify the class, create appropriate subclasses, or even decertify the class if warranted at a later date.[11] Under Amoco's theory, if the trial court modified the certification order prior to a final determination on the merits, Amoco could repeatedly seek *certiorari* to this Court following each such modification. Such piece meal appellate review would effectively end the finality requirement, would flood the Court with ill-founded certification applications, and would result in a tremendous waste of judicial resources.[12] Amoco has failed to demonstrate why review of a final judgment would not sufficiently protect its due process and full faith and credit interests.

Amoco argues that the Court has jurisdiction for *certiorari* review in any case where a defendant is forced to expend substantial time and money defending a class action, an argument commonly referred to as the "Death Knell Doctrine." That argument has been categorically rejected by this Court:[13]

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[10] 16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4010 p. 171 (2nd ed. 1996).

[11] Pet. App. 7a, 17a, 49a-50a.

[12] 16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4010 p. 202 (2nd ed. 1996).

[13] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978).

> [T]he fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a final decision within the meaning of §1291.[14]

Respondents respectfully request the Court to dismiss Amoco's petition for *certiorari* for want of jurisdiction.

STATEMENT OF THE CASE

The statement of the case presented by Amoco presents in a false light much of the evidence upon which the Oklahoma Court of Civil Appeals found that the trial court did not abuse its discretion in certifying a nationwide class action.

Amoco incorrectly asserts that the Oklahoma courts below failed to require a choice of law analysis before certifying a class action, and that such purported failure was violative of this Court's pronouncement in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Oklahoma courts understood and correctly applied *Shutts* when they considered how the choice of law issues would affect the

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[14] *Coopers & Lybrand v. Livesay*, 437 U.S. at 477. See also, 7B C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, §1802 (2nd ed. 1986) (The inverse death knell doctrine propounded in *Herbst v. International Tel. & Tel. Corp.*, 495 F.2d 1308 (2nd Cir. 1974) and *Parkinson v. April Industries, Inc.*, 520 F.2d 650 (2nd Cir. 1975), cases relied upon by Amoco, was rejected by implication in *Coopers & Lybrand v. Livesay*).

predominance and superiority requirements of certification pursuant to 12 Okla. Stat. §2023.[15] *Shutts* has limited application at the present stage of these proceedings because much of the discussion in *Shutts* involved the propriety of merit based determinations where substantive state law was actually applied to the underlying claims of the class members. The appeal in *Shutts* was not from an interlocutory order certifying the class (which is the situation in the present case), but instead was an appeal after the trial on the merits.[16] In determining whether a class action will be certified, the merits are not to be examined and all uncontroverted allegations in the instruments of record and the undenied statements of counsel in their briefs are to be taken as true.[17] In *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. 265, 267 (D. Colo. 1994), the court held: "In ruling on a motion for class certification pursuant to Rule 23 . . . [the court] may not consider the merits of the proposed class action

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[15] *Microsoft v. Manning*, 914 S.W.2d 602 (Tx. Ct. App. 1995); *Roberts v. Heim*, 670 F.Supp. 1466 (N.D. Cal. 1987), *cert. denied*, 493 U.S. 1002 (1989); *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626 (N.D. 1988); *Gordon v. Boden*, 586 N.E.2d 461 (Ct. App. Ill. 1991), *cert. denied*, 506 U.S. 907 (1992); *In re Activision Securities Litigation*, 621 F.Supp. 415, 430-431 (N.D. Cal. 1985); *Angeles/Quinoco Securities Corp. v. Collision*, 841 S.W.2d 511, 516-517 (Tx. App. 1992); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *In re Computer Memories Securities Litigation*, 111 F.R.D. 675, 685 (N.D. Cal. 1986).

[16] *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 799.

[17] *Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okla. 1984); *Perry v. Meek*, 618 P.2d 934, 941 (Okla. 1980); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

claim."[18] With respect to the choice of law issue in the present case, the trial court did not finally determine what law would govern the trial on the merits, but found under *Shutts* that:

> Oklahoma has significant contacts and aggregation of contacts to the claims asserted by each class member to create sufficient state interests to ensure that the application of Oklahoma law is not arbitrary, unfair, or in violation of due process.[19]

The court found that at the certification hearing it would be improper to decide definitively which law applies because to do so would require a merit based determination.[20]

Amoco states as a "fact" that its billing practices are governed by 7,000 joint operating agreements and that the manner in which the joint operating expenses were billed varied substantially. Even if Amoco's contention is accurate as to the number of joint operating agreements (PX 2L questions the accuracy of this assertion), the Oklahoma courts found that the provisions of the agreements which are at issue in this case are uniform across the board with only minor exceptions.[21] The only evidence presented at the certification hearing demonstrated overwhelmingly that the charges disputed by the class were

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[18] Citing, *Pennsylvania v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975). See also, *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).

[19] Pet. App. 6a, 46a.

[20] Pet. App. 6a-7a, 54a-55a.

[21] Pet. App. 8a, 9a, 21a-22a, 24a-25a, and 29a.

uniformly billed by Amoco to the class members regardless of which agreement was in place.[22] This evidence was utilized in forming a portion of the trial court's findings:

> The Court finds that Amoco itself treats the class members as a class each and every month when it uniformly and systematically bills the class members for the same types of allocated charges through FLACs from its Tulsa, Oklahoma offices . . . Amoco admitted Lobo's commonality and typicality with working interest owners throughout the nation, stating "We [Amoco] have approximately 60 audits performed on Amoco operated properties each year, all of which receive charges in the same manner and using the same systems as those used to generate charges to this [Lobo's] unit. (Plaintiff's Exhibit 6H, 6I and 2CC.)"[23]

The witnesses at the certification hearing, including those employed by Amoco, testified that the agreements were of standard form and that the relevant provisions and their interpretation did not change significantly over time.[24]

Amoco's reference in its "Statement of Facts" to 250 audits since 1990 is misleading for all of the following reasons. Most of the audits were multiple audits by the same small group of approximately 30 companies. Many of the audits were by the same companies on the same wells for multiple time periods. Almost half of the audits

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[22] *Id.*

[23] Pet. App. 21a-22a.

[24] Pet. App. 22a-29a.

did not deal with any of the billing issues raised by the class, and none of the audits fully explored the depth or breadth of Amoco's fraudulent double billing scheme. There was no evidence that the information obtained in the audits was routinely shared by the auditing company with other working interest owners in the well. Although Amoco states that most of the audits have been resolved, the evidence was that many of the audits which included issues raised by the class have not been resolved, and the instances where those issues were resolved resulted in credits to Amoco's joint owners in the amount of approximately ten million dollars. These payments only help confirm that Amoco was well aware of its wrongful double billing. Some of the audits were "resolved" because the amounts were too small to economically pursue. Even so, 250 audits on 26,000 wells is an exceedingly small number.

Amoco contends that it made full and express disclosure to companies which audited its records on issues raised by the class. The evidence at the certification hearing was that Amoco responded to audit inquiries with uniform, standardized responses given without regard to the purported variations which Amoco now alleges exist among its agreements with the class members.[25] This consistent treatment by Amoco further reinforces the wisdom of class certification by the trial court.

Amoco contends in its "Statement of Facts" that the large, sophisticated working interest owners who pay a large portion of the **total** joint interest billings (but not

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[25] Pet. App. 21a-25a.

necessarily the disputed charges) knew of the "hidden" charges. Amoco acknowledged that its billing practices were "pushing the envelope" and identified a handful of class members as having certain types of billing practices which Amoco asserted, without substantive evidentiary support, were similar to those that are the subject of the class claims against Amoco. The references to the practices of the other companies were primarily anecdotal, and no billing documents were shown to demonstrate that the alleged similarities actually existed. Amoco's argument relates to the merits of the action, and inquiry into the merits is prohibited when the court is deciding whether a class should be certified.[26] Even if one were to blindly accept the truth of Amoco's assertion, it would mean that approximately 1% of working interest owners (the "large, sophisticated working interest owners") may have known something about Amoco's fraudulent billing scheme. That assumption would only reinforce the fact that the majority of the class knew nothing of Amoco's scheme.

One of the most glaring misstatements in Amoco's recitation of the facts is its contention that the Oklahoma courts failed to conduct any analysis of the contacts of the absent class members that would justify application of Oklahoma law to their claims. The trial court specifically identified the contacts of the class members with Oklahoma that related to the actions of Amoco in this case:

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[26] *Eisen v. Carlisle*, 417 U.S. at 177-78. Pet. App. 12a-13a citing, *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998).

> Amoco's billing practices and accounting procedures for oil and gas properties in the United States are centralized in Tulsa, Oklahoma. Owners in Amoco operated properties nationwide receive joint interest bills which are generated from Amoco's Tulsa, Oklahoma, offices. Amoco's uniform and systematic allocation of charges is centralized and computerized in Tulsa, Oklahoma. Complaints regarding joint interest billings from Amoco operated properties nationwide were directed to Amoco's Tulsa, Oklahoma office. Audits of Amoco operated properties nationwide were directed to and performed at Amoco's Tulsa, Oklahoma, office.[27]

Likewise following its review, the Oklahoma Court of Civil Appeals also found that Oklahoma had significant contacts or aggregation of contacts to the claims asserted by each class member to create sufficient state interest to ensure that application of Oklahoma law was not arbitrary, unfair, or violative of due process.[28] As pointed out by the Oklahoma Court of Appeals, Lobo, on behalf of itself and the class, complains of Amoco's conduct in Oklahoma.[29] Oklahoma has an interest in redressing wrongs committed within Oklahoma.[30]

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[27] Pet. App. 51a-52a.

[28] Pet. App. 6a-7a.

[29] Pet. App. 12a.

[30] Pet. App. 12a, citing *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 847 (Ill. 1987) and *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Az. 1983).

REASONS FOR DENYING PETITION FOR *CERTIORARI*

I. DUE PROCESS AND FULL FAITH AND CREDIT DO NOT PROHIBIT OKLAHOMA FROM APPLYING ITS OWN LAW TO A NATIONWIDE CLASS ACTION

Amoco's Due Process and Full Faith and Credit challenge is without merit. The trial court looked at the contacts between the State of Oklahoma and the class members, as well as the transactions and circumstances surrounding Amoco's alleged double billing scheme and found numerous significant contacts that would preliminarily appear to satisfy a constitutional basis for applying Oklahoma law to the entire class.[31] Such contacts include the fact that Amoco's billing practices and accounting system and procedures for oil and gas properties in the United States are centralized in Oklahoma.[32] Class members receive joint interest bills which are generated and mailed in Oklahoma.[33] Amoco's uniform and systematic allocation of charges is centralized and computerized in

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[31] Pet. App. 6a, 20a-21a, 51a-52a. In reviewing similar challenges this Court has examined whether the state whose law was applied had significant contact or aggregation of contacts, creating state interests, with the parties to the litigation or with the occurrences or transactions which gave rise to the litigation in order to ensure that the choice of law was neither arbitrary nor fundamentally unfair. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-09 (1981) (plurality); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818; *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947).

[32] Pet. App. 6a, 20a-21a, 51a-52a.

[33] Pet. App. 51a-52a.

Oklahoma.[34] Class members are directed to, and do, submit any questions and complaints regarding the class members joint interest bills for Amoco operated properties nationwide to Amoco's Oklahoma office.[35] Class members requests for audits are directed to Oklahoma, and audits of Amoco properties nationwide can only be performed in Oklahoma.[36] Oklahoma clearly has a significant state interest in redressing the wrongful conduct committed within its borders by an enterprise operated in Oklahoma even though some of the persons damaged may be located outside this state.[37] Contacts similar to or of even less significance have routinely been found to justify the application of one state's law to a controversy involving parties in multiple states.[38]

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[34] Pet. App. 52a.

[35] *Id.*

[36] *Id.*

[37] *Id. State ex rel. Corbin v. Pickrell*, 667 P.2d at 1312; *Brown v. Market Dev. Inc.*, 332 N.E.2d 367 (Ohio 1974).

[38] *See, State ex rel Corbin v. Pickrell*, 667 P.2d at 1312, (Arizona law could be applied to conduct by local business against out-of-state residents.) *In re Computer Memories Securities Litigation*, 111 F.R.D. at 686, (California law could be applied to entire class in nationwide securities fraud case where defendant was a California corporation, acts complained of emanated from California, and the money collected went to California.) *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1535-36 (M.D. Fla. 1989) (Oklahoma Blue Sky Laws applied to the sales of securities because of the number and extent of activities occurring in Oklahoma and because of Oklahoma's legitimate interest in having its law applied.) *In re Kirschner Medical Corp. Securities Litigation*, 139 F.R.D. 74, 83-84 (D. Md. 1991) ("[A]pplication of Maryland law to the common law claims is neither arbitrary nor unfair because contacts exist

Even if the law of another state could constitutionally be applied, it would not render the application of Oklahoma law unconstitutional. This Court has long recognized that a set of facts giving rise to a lawsuit may constitutionally justify the application of the law of more than one jurisdiction.[39]

As a result, the forum state may have to select one law from among the laws of several jurisdictions having some contact with the controversy.[40]

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between the forum and the claims asserted.") *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 411 (D.C. N.J. 1990) (New Jersey law could be applied to the claims of the class because "the interest of states other than New Jersey where the class members reside would be advanced by providing these plaintiffs with an opportunity to litigate their negligent misrepresentation claims in a single action.") *Brown v. Market Dev., Inc.*, 322 N.E.2d at 369. (Ohio UDAP statute is intended to prohibit, and to provide civil remedies to enforce the prohibitions of, deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio.) *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325, 334 (D.S.C. 1991) (Applying South Carolina law to the claims of the class, including claims of common law fraud.) *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex. Civ. App. 1976) ("A state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders.")

[39] *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-308 (citing, *Watson v. Employers Liability Corp.*, 348 U.S. 66, 72-73 (1954) and *Clay v. Sun Insurance Office Ltd.*, 377 U.S. 179, 181-82 (1964).)

[40] *Allstate Ins. Co. v. Hague*, 449 U.S. at 308. See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 822 ("[W]e reaffirm our observation in Allstate that in many situations a state court may be free to apply one of several choices of law."); and *Sun Oil Co. v. Wortman*, 486 U.S. at 730.

Amoco has argued inconsistent choice of law approaches at different junctures in this case. In its initial brief submitted to the trial court Amoco argued that a lawsuit involving numerous plaintiffs from multiple states bringing claims like those sought by the class was legally permissible, manageable and routine. As stated by Amoco: "Non-operators who have interests in a common group of units or wells, and who share the same operative facts, have for decades combined together to bring oil and gas lawsuits." Then, in its submissions to the Oklahoma appellate courts, Amoco propounded the inconsistent argument that the law of the state where a damaged class member resided must control the controversy. In its petition for *certiorari* to this Court, Amoco now inconsistently argues that application of the laws of 18 different states where the wells are located must control the controversy. Not only are Amoco's arguments at various stages of this lawsuit inconsistent with one another, they are also inconsistent with the many pronouncements of this Court and other lower courts.

Amoco has never attempted to demonstrate that the contract laws of each of these 18 states conflict or that application of the laws of even 18 states would make the case unmanageable.[41] The trial court specifically noted that appropriate subclasses could be created to manage the case if, upon further proceedings, it appeared some variation in treatment of members of the class was warranted.[42]

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[41] Pet. App. 54a.

[42] Pet. App. 49a-50.

II. THE CHOICE OF LAW ISSUE IS ONLY ONE FACTOR TO CONSIDER IN DETERMINING THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS OF A CLASS ACTION

At the certification stage of the case, the trial court conducted a threshold inquiry to determine, *inter alia*, whether the choice of law issue would negatively impact the predominance requirement of 12 Okla. Stat. §2023 so as to outweigh other factors favoring class certification.[43]

In *Gordon v. Boden* the plaintiffs represented a nationwide class of consumers who bought adulterated orange juice products that were processed by defendant. The orange juice was labeled 100% orange juice when in fact it contained other low-cost, inferior ingredients. The trial court granted the plaintiffs' motion for class certification. The defendant appealed the certification and argued in part that the trial court would have to apply to each purchase the substantive law of the state in which each class member bought the adulterated orange juice. The defendant contended that the common question was, therefore, governed by the substantive laws of possibly 50 states and did not predominate. The appellate court did not agree.

> The question of whether the laws of different states apply to specific transactions alleged in a class action will not ordinarily prevent certification of the class. [Citations omitted.] We initially note that if the trial court found that Illinois has significant contact to the claims asserted by each

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[43] See, *Roberts v. Heim*, 670 F.Supp. at 1495 and *In Re Computer Memories Securities Litigation*, 111 F.R.D. at 685-686.

> class member, the court could apply Illinois substantive law to this multi-state class action. This finding would ensure that the application of Illinois law is neither arbitrary nor unfair. . . . Moreover, if at some later time in the litigation the subclassification becomes unmanageable, the court, of course, always has the option to set aside the class certification or a portion of it. [Citations omitted.] **At the most, this question constitutes a hypothetical problem that might arise in the future.** As such, it is not a sufficient basis to refuse to certify an otherwise properly pleaded class action. [Citations omitted.] [Emphasis added.][44]

Similarly, in *Peterson v. Dougherty Dawkins, Inc.* the defendant ineffectively argued the choice of law issue before it had been determined.

> Dougherty argues the trial court erroneously held that North Dakota law will govern all the bondholders claims. Dougherty asserts the decision of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2966, 86 L.Ed.2d 628 (1985), precludes application of North Dakota law to the nonresident bondholders.
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> Dougherty has misconstrued the trial court's order. **The court did not rule that North Dakota law would govern all claims, but specifically reserved ruling on that issue.** The court expressly noted that, if conflict of law questions become "problematic," the court might create

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[44] *Gordon v. Boden*, 586 N.E. at 465.

> subclasses or exclude particular members from the class.
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> When the trial court ultimately decides the choice of law issues, it must consider the holding in Phillips Petroleum that a state may apply its own law to members of a class only if the state has a significant contact or an aggregate of contacts to the claims asserted by each class member. [Citation omitted.] Phillips Petroleum does not, however, hold that a multi-state class action cannot be certified if the court will have to apply different states' law to some class members' claims. [Emphasis added.][45]

The Oklahoma courts' determination that Oklahoma law could constitutionally apply to the claims of the class, demonstrates that in the courts' opinion the predominance requirement was not destroyed by the choice of law issues.

III. CLASS CERTIFICATION DOES NOT REQUIRE PLAINTIFF TO PROVE ALL POSSIBLE LAWS THAT COULD APPLY

Amoco's argument that it is the plaintiff's burden to identify all of the possible laws that could apply to the class has been rejected by this Court.[46] Neither the Due

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[45] *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d at 626.

[46] *Sun Oil Co. v. Wortman*, 486 U.S. at 730-72; *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914); *Texas & N.O. R. Co. v. Miller*, 221 U.S. 408, 416 (1911); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Louisville*

Process Clause nor the Full Faith and Credit Clause mandates that a state must adopt any particular set of conflict rules, but merely sets certain minimum requirements which each state must observe when asked to apply its own laws or the laws of sister states.[47]

& Nashville R. Co. v. Melton, 218 U.S. 36, 51-52, (1910); *Banholzer v. New York Life Ins. Co.*, 178 U.S. 402, 408 (1900); See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 834-842 (Stevens, J., concurring in part and dissenting in part).

Amoco's reliance on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is misplaced. In *Amchem* the Court was confronted with the legitimacy under Rule 23 of a global settlement of current and future asbestos-related claims. Such a determination at settlement is merit based. The class proposed for certification encompassed hundreds of thousands, perhaps millions, of individuals, each of whom were, or some day could be, adversely affected by past exposure to asbestos products manufactured by one or more of the twenty defendant companies. The Court expressly stated it had granted review to decide the role settlement might play in determining the propriety of class certification. The Court noted that "[n]o settlement class called to our attention is as sprawling as this one." *Id.* at 622. The case at hand, unlike *Amchem*, does not present the issue of the propriety of a merit based determination on certification of a class action for settlement of mass tort, personal injury claims that, by their very nature, involved individualized questions of damages, liability and defenses that affected each class member in peculiarly personal ways. In this case the Oklahoma courts certified a nationwide class that had been monetarily damaged by Amoco's uniform double billing scheme contrived in and carried out from the State of Oklahoma.

[47] *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 177-178; *Wortman*, 486 U.S. at 735 (Blackmun, concurring in part and concurring in judgment) (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953).) *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818, *Allstate Ins. Co. v. Hague*, 449 U.S. at 312, 313.

In *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), the court said that requiring the plaintiff to prove all the differences in various states' laws was requiring a merit based determination of the plaintiffs' claims at the certification hearing in direct contravention of the holdings in *Eisen v. Carlisle & Jacquelin* and its progeny.[48]

In *In re Computer Memories Securities Litigation* the defendant argued that the plaintiff had the burden at the certification stage to show all of the possible jurisdictions whose law could apply. The court rejected the defendant's argument and said:

> Imposing such a burden on the putative class representatives seems overly onerous in light of the fact that, at the time of the class certification motion, it may be unclear whether any party will ever attempt to invoke the law of another jurisdiction. The court would in effect be requiring the putative class representative to defeat a myriad of motions for the application of foreign law that may never be filed.[49]

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[48] *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. at 267, *Anderson v. City of Albuquerque*, 690 F.2d at 799.

[49] *In re Computer Memories Securities Litigation*, 111 F.R.D. at 685.

CONCLUSION

Certification of a nationwide class is supported by the evidence, the holdings of this Court and the Constitution of the United States. As succinctly stated in *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979):

> Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule.

The interlocutory order certifying this case as a class action is firmly centered on a common, uniform, and systematic double-billing scheme created, implemented, and carried out within the State of Oklahoma by Amoco which has affected Amoco's non-operating working interest owners nationwide. The issues presented in Amoco's petition for writ of *certiorari* do not raise novel issues or issues of great public importance or national interest such that this Court should devote its limited time and resources to a review.[50]

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[50] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); 16B C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §4001 (2nd ed. 1996).

Respondent respectfully requests this Court to deny Amoco's petition for writ of *certiorari*.

Respectfully submitted,

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April 10, 2000

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